Nur Adeena bt Mohd Syahmir v Kerajaan Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCvC-160–09 OF 2021
AKHTAR TAHIR J
3 JULY 2023

Damages — Assessment — Tort — Medical negligence — Assessment of general damages and future damages — Whether expert witnesses were competent witnesses — Whether court empowered to determine place of treatment or manner of treatment

The plaintiff, an infant girl had brought an action against the Government of Malaysia ('the first defendant') and 18 medical officers of the Government Hospital for medical negligence which had caused the plaintiff to suffer a spinal cord injury leaving her as a tetraplegic and paralyzed from neck downwards since birth. The plaintiff was now dependent on a ventilator, and she had tracheostomy attached to her. The present case was in relation to the assessment of damages after the first defendant admitted liability. There was a partial consent judgment between the parties in relation to special damages amounting to RM83,557.91, pre-trial damages amounting to RM181,320, certain items of future damages amounting to RM226,500 and multiplicands subject to multiplier determined by the court for items 29, 32, 62, 69 and 79. The main dispute in the present case was in relation to the future damages.

Held:

(1) The court awarded a sum of RM300,000 as general damages for pain and suffering as a reflective sum of the loss suffered. The court dismissed the plaintiff's contention that the defendants' witness being a government employee would be biased. Both the expert witnesses were competent witnesses and they had provided cogent reason for their opinion. The court's reliance on expert evidence was allowed under s 45 of the Evidence Act 1950. There were positive signs in the condition of the plaintiff which pointed to possibility of the weaning off the ventilator, as such, the court accepted 23 years as the life expectancy (see para 10, 12(a) & (c)).

(2) The amount of damages awarded must compensate as best as possible the additional expenses which would be incurred by the care givers in caring for the plaintiff with the disabilities suffered but must discount normal expenses incurred in the upbringing of a healthy and normal child. The court disallowed certain items of damages claimed by the plaintiff as this were normal expenses (see para 12(d)).

(3) Although the principal care givers in this case would be the parents, the court agreed that the parents needed assistance as it would be humanely impossible to give 24 hours care to the plaintiff. The court was of the view that a live-in maid would alleviate some of the burden of the parents (see para 12(f))

[Bahasa Malaysia summary

Plaintif, seorang kanak-kanak perempuan telah membawa tindakan terhadap Kerajaan Malaysia ('defendan pertama') dan 18 pegawai perubatan Hospital Kerajaan atas kecuaian perubatan yang telah menyebabkan plaintif mengalami kecederaan saraf tunjang menyebabkan dia tetraplegic dan lumpuh dari leher ke bawah sejak lahir. Plaintif kini bergantung pada ventilator, dan dia mempunyai trakeostomi pada tubuhnya. Kes semasa adalah berkaitan dengan penilaian ganti rugi selepas defendan pertama mengakui liabiliti. Terdapat penghakiman persetujuan separa antara pihak-pihak berhubung dengan ganti rugi khas berjumlah RM83,557.91, ganti rugi pra-perbicaraan berjumlah RM181,320, item tertentu ganti rugi masa hadapan berjumlah RM226,500 dan gandaan tertakluk kepada pengganda yang ditentukan oleh mahkamah untuk item 29, 32, 62, 69 dan 79. Pertikaian utama dalam kes ini adalah berkaitan dengan ganti rugi masa hadapan.

Diputuskan:

(1) Mahkamah mengawardkan sejumlah RM300,000 sebagai ganti rugi am untuk kesakitan dan penderitaan untuk mencerminkan kerugian yang dialami. Mahkamah menolak dakwaan plaintif bahawa saksi defendan-defendan sebagai kakitangan kerajaan akan berat sebelah. Kedua-dua saksi pakar yang dipanggil adalah saksi-saksi yang berwibawa dan mereka telah memberikan alasan yang kukuh untuk pendapat mereka. Kebergantungan mahkamah terhadap keterangan pakar dibenarkan di bawah s 45 Akta Keterangan 1950. Tanda positif dalam keadaan plaintif menunjukkan kebarangkalian penyapihan awal dari ventilator, dengan itu, mahkamah menerima 23 tahun sebagai jangka tempoh hayat (lihat perenggan 10, 12(a) & (c)).

(2) Jumlah ganti rugi yang diberikan mestilah mengimbangi sebaik mungkin perbelanjaan tambahan yang akan ditanggung oleh penjaga dalam menjaga plaintif dengan kecacatan yang dialami, tetapi, jumlah tersebut tidak termasuk perbelanjaan biasa yang ditanggung dalam membesarkan anak yang sihat dan normal. Mahkamah tidak membenarkan beberapa item ganti rugi yang dituntut oleh plaintif kerana ini adalah perbelanjaan biasa (lihat perenggan 12(d)).

(3) Walaupun penjaga utama dalam kes ini adalah ibu bapa, mahkamah bersetuju bahawa ibu bapa memerlukan bantuan kerana adalah mustahil untuk memberikan penjagaan 24 jam kepada plaintif. Mahkamah

berpandangan bahawa pembantu rumah yang tinggal bersama akan meringankan sedikit beban ibu bapa (lihat perenggan 12(f)).]

Cases referred to

Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292; [1981] 1 LNS 106, FC (folld)

Legislation referred to

Evidence Act 1950 s 45

MS Dhillon (with Alicia Chin) (PS Ranjan & Co) for the plaintiff.
Siti Norashikin bt Hassanor (Attorney General's Chambers) for the defendant.

Akhtar Tahir J:

BACKGROUND

[1] The plaintiff in this case initiated a claim for medical negligence against 19 defendants who comprised of the Government of Malaysia and the 18 medical officers attached to the government hospital.

[2] As a result of the medical negligence the plaintiff an infant girl suffered a spinal cord injury leaving her as a tetraplegic and paralyzed from neck downwards since birth on 12 May 2020. The plaintiff is at the moment dependent on a ventilator and also she has tracheostomy attached to her

[3] The first defendant the Government of Malaysia admitted liability on 26 July 2022 after which the plaintiff withdrew all claims against the second to 19th defendant.

[4] The trial proceeded for assessment of damages and lasted for two days whereby the plaintiff called two witnesses ie the mother of the plaintiff (SP2) and an expert witness Dr Kavitha (SP1). The first defendant called an expert witness Mohaneswari d/o Sandrajagran (SD1).

ASSESSMENT OF DAMAGES

[5] In the Federal Court case of *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292; [1981] 1 LNS 106 it was stated:

> A global award has the distinct advantage of covering a multitude of sins. It does not show where or how the judge had erred on the side of over-generosity or on the side of parsimony. But there is at least one good reason why a global sum should be discouraged.

A It must be remembered that the purpose of damages is to try, so far as humanly possible, to put the victim back to the position he would have been in but for the accident. The damages must be fair, adequate and not excessive. A reasoned judgment must therefore be given by the judge, following legal principles and precedents. Other awards in other cases should normally be prayed in aid, but
B consideration must be given where the circumstances differ.

[6] The court taking guidance from the decision above that a global sum of damages is not suitable in a medical negligence claim, directed the plaintiff to prepare in tabulated form all the heads of damages claimed making reference to
C the evidence to be adduced. The defendant in turn was directed to respond to each of the item of damages claimed.

[7] This tabulated heads of damages allowed the parties to determine the actual areas of dispute. This pre-trial case management directive also allowed
D the parties to agree on a number of items of damages and this formed part of a partial consent judgment.

[8] The partial consent judgment between the parties is detailed out in the
E plaintiff's written submission. The court deemed it not necessary to reproduce the entire details of the partial consent judgment save to summarise as follows:

(a) special damages RM83,557.91;

(b) pre-trial damages RM181,320;

F

(c) certain items of future damages RM226,500 (inclusive of renewals) (items 22, 25, 27, 36, 37, 76 and 80); and

(d) multiplicands subject to multiplier determined by court for items 29, 32, 62, 69 and 79.

G

[9] For the items of damages not agreed upon the court assessed the damages based on the oral evidence of the experts, the caregiver (the plaintiff's mother) as well as documentary evidence contained in the bundle of
H documents.

GENERAL DAMAGES

[10] The court awarded a sum of RM300,000 as general damages for pain
I and suffering. In the court's view no amount of money can lessen the pain and suffering of the plaintiff. Therefore the court can only give a reflective sum of the loss suffered. The sum cannot be exorbitant but a reasonable sum to reflect the loss suffered.

DISPUTED ITEMS OF FUTURE DAMAGES

[11] In this case the main bone of contention between the parties was the future damages. The court assessed the various items of future damages based on the various factors as gleaned from the expert evidence as well as submissions of the both parties.

[12] After considering the entire evidence the court made the following findings:

(a) both the expert witnesses called by the parties are competent witnesses. The court dismissed the plaintiff's contention that the defendant's witness being a government employee would be biased in favor of the defendant. From the court's observation both the experts provided cogent reason for their opinion. Neither of the expert showed any biasness and gave an independent opinion based on their experience, knowledge and expertise.

The court's reliance on expert evidence is allowed under s 45 of the Evidence Act 1950:

> (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> (2) Such persons are called experts.
>
> ILLUSTRATIONS
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> (a) The question is whether the death of A was caused by poison.
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> The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant.
>
> (b) The question is whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.
>
> The opinions of experts upon the question whether symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do or of knowing that what they do is either wrong or contrary to law, are relevant.
>
> (c) The question is whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.
>
> The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

(b) the court also accepts the fact that the basis for assessment is a once and-for-all basis of assessment as opposed to periodical review assessment practiced in some countries.

In the Federal Court case of *Yang Salbiah & Anor v Jamil bin Harun* it was stated as follows:

> Liability for the accident having been fully admitted by the defence, she must recover a substantial award for general damages to cover past, present and future, injury and loss. Such an award is final and as remarked, 'it is not susceptible to review as the future unfolds, substituting fact for estimate'. The award has to be a lump sum assessed at the conclusion of the legal process.

(c) the court noted based on the evidence of both the experts that there was a paucity of medical literature on the life expectancy of children with spinal cord injuries. In the court's view in determining the life expectancy each case has to determined individually based on the facts of each case which includes the nature of the injuries suffered.

The plaintiff's expert proposed a life expectancy of 23 years whereas the defendant's expert suggest 17.5 years to 18.4 years and 21.7 to 22.1 years if weaned off from the ventilator.

In the court's view it will be very difficult to predict at the present moment whether the plaintiff can be weaned off from the ventilator. However accepting the opinion of the plaintiff's expert that there were positive signs in the condition of the plaintiff which points to possibility of the weaning off the ventilator the court accepted 23 years as the life expectancy.

The court also feels that where the damages are to be given in once-and for-all basis the court should lean in favor of a longer expectancy rather than a shorter period. Further in the era of technology advancement chances of a longer life expectancy is to be expected.

In this case taken into account the plaintiff is two years old the court must give sufficient compensation to cover for the remaining expected 21 years left;

(d) further the court is of the view the amount of damages awarded must compensate as best as possible the additional expenses which will be incurred by the care givers in caring for the plaintiff with the disabilities suffered. However the amount must discount normal expenses incurred in the upbringing of a healthy and normal child.

Based on this the court disallowed certain items of damages claimed by the plaintiff as this were normal expenses which would be incurred for any child whether disabled or not.

The court also allowed only the items necessary and suitable looking at the condition of the plaintiff. The court deemed that some of the equipment recommended by the expert as not suitable for the use of the

plaintiff taking into account the disabilities of the plaintiff. A

This includes the electronic hoist and other such equipment which will add the burden of the caregivers instead of alleviating it.

(e) the court also takes the stand that it is not empowered to determine the best place for the treatment or the manner the treatment should be given. The place and manner for treatment must be determined by the care givers in this case the parents. The parents must not be shackeled with the burden of choosing cheaper treatment as opposed to better and timely treatment. B

The court therefore cannot accept the contention of the defendant that the best place for treatment is the government facilities which is free or cheap. This might be true but more important factor in the court's view is to decide what the best treatment is. The best might not be the cheapest. C

In the court's view the mitigating factor should be put into a back pedal as compared to the best treatment to be given to the plaintiff. D

The court's duty in assessing damages is to provide the plaintiff with a budget which will provide the best medical care for the duration of the plaintiff's life expectancy. The court is confident in this case the caregiver being the parents will be prudent in utilizing the budget in the best possible manner for the best treatment rather than being influenced by the cheap cost of treatment; and E

(f) next the court noting that although the principal care givers in this case will be the parents, the court agrees that the parents need assistance as it will be humanely impossible to give 24 hours care to the plaintiff needed in this case. F

The court feels that live in maid will alleviate some of the burden of the parents. The court also decided that to provide more than one maid would be a luxury rather than a necessity and therefore dismissed the plaintiff's suggestion of two maids. G

The court also viewed it necessary for a trained nurse to be available in the event of an emergency or even for a regular visit. The court views it unnecessary for a full time nurse as suggested by the defendant. H

[13] Based on the above factors the court awarded the sums as stipulated in the court's order filed as encl 64. The court order encompasses all the factors above in the determination of the amount of damages as well as the items of damages allowed. I

Order accordingly.

Reported by Dzulqarnain Ab Fatar